No. 94-270

In The

Supreme Court of the United States

October Term, 1994

THE UNITED STATES OF AMERICA,

Petitioner,

v.

ROBERT P. AGUILAR,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did false statements to FBI agents during an informal investigative interview unconnected with a grand jury constitute obstruction of justice within the meaning of the omnibus clause of 18 U.S.C. § 1503 prior to the enactment of the Criminal Law and Procedure Minor Substantive and Technical Amendments Act of 1987?

2. Does disclosure of the existence of a wiretap authorization that has expired constitute a violation of 18 U.S.C. § 2232(c)?

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Respondent Robert P. Aguilar respectfully requests that the Court deny the Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit filed by the Solicitor General on behalf of the United States.

I. STATEMENT

On April 19, 1994, a unanimous eleven-member, *en banc* panel of the Ninth Circuit reversed the conviction of respondent Robert P. Aguilar, a judge of the United States District Court for the Northern District of California, for obstruction of justice in violation of 18 U.S.C. § 1503.

Nine of the eleven panel members also agreed to reverse Judge Aguilar's conviction for disclosure of a wiretap authorization in violation of 18 U.S.C. § 2232(c). In each instance, the Ninth Circuit ruled that the record did not establish a violation of the statute.

A. History of the Proceedings Below

Judge Aguilar originally was charged in an eight-count indictment along with Michael Rudy Tham ("Tham") and Abie Chapman ("Chapman") on June 13, 1989. The centerpiece of the charges against Judge Aguilar was that he violated the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962(c), by allegedly obstructing the affairs of the U.S. District Court for the Northern District of California through a pattern of racketeering activity. The government charged Judge Aguilar, Tham and Chapman with one count of conspiracy to deprive the United States of its governmental rights and functions and to obstruct justice in connection with Tham's *habeas corpus* petition before the Honorable Stanley Weigel in violation of 18 U.S.C. § 371, and with one count of endeavoring to obstruct justice in violation of 18 U.S.C. § 1503. The government also charged Judge Aguilar alone with three additional violations of 18 U.S.C. § 1503; and two counts of unlawful disclosure of an application for a wiretap authorization in violation of 18 U.S.C. § 2232(c). *See* Pet. at 4a, 30a.

On March 19, 1990, a jury acquitted Judge Aguilar of one count of obstruction of justice, but was unable to reach a verdict on the remaining counts. The district court accordingly declared a mistrial and set a retrial for all

three defendants. Subsequently, the district court granted the unopposed motion of the government to dismiss with prejudice the RICO charge and one obstruction of justice count against Judge Aguilar and granted the unopposed motions of Tham and Chapman for severance. A second jury acquitted Judge Aguilar of all counts connected with the underlying conspiracy to influence Judge Weigel and one wiretap disclosure count, but convicted him of one count of endeavoring to obstruct justice in violation of 18 U.S.C. § 1503 and of unlawfully disclosing the existence of a wiretap application in violation of 18 U.S.C. § 2232(c). *Id.* at 4a-5a, 30a, 67a-68a; Tr. 1590-91.

A divided panel of the Ninth Circuit reversed the obstruction of justice conviction and affirmed the wiretap disclosure conviction. *Id.* at 29a-113a. A majority concluded that, as to both counts, the district court erroneously relieved the government of its burden to prove beyond a reasonable doubt the element of knowledge, essential to both counts of conviction, by requiring the government to establish only what Judge Aguilar "probably" knew. *Id.* at 77a-90a, 100a-101a, 102, 104a-105a. A different majority found that the erroneous jury instruction was harmless as to the wiretap disclosure conviction. *Id.* at 51a-52a, 103a-104a.

On rehearing *en banc*, the Ninth Circuit did not reach the knowledge issue. *Id.* at 25a. Instead, the court reversed both counts on the grounds that the conduct did not violate the statutes under which it was charged. *Id.* at 1a-28a. The eleven *en banc* panel members agreed unanimously that the government had not identified a violation of Section 1503. The court affirmed that there was "no evidence that a grand jury had authorized or directed

the FBI investigation, [or] . . . that the FBI agents had been subpoenaed to testify." *Id.* at 18a. Thus, "[t]he conduct alleged was interference with an FBI investigation, not a judicial proceeding." *Id.* The court unanimously held that "interference with an FBI investigation" by making false statements during an informal interview did not obstruct or impede a pending judicial proceeding in violation of Section 1503. *Id.* at 18a-24a.

The *en banc* court also held, over the dissent of only two of its members, that the alleged conduct failed to establish that Judge Aguilar had violated 18 U.S.C. § 2232(c). *Id.* at 8a-15a; 25a-28a. The court reasoned that "[t]he plain language of the statute makes it clear that the purpose of the statute is to prevent interference with a 'possible interception.' " *Id.* at 9a (quoting 18 U.S.C. § 2232(c)). Since the government charged Judge Aguilar with attempting to give notice of an authorization to intercept certain electronic communications that had expired more than eight months before the disclosure, *id.* at 5a-8a, the government failed to establish a violation of Section 2232(c). *Id.* at 15a.

B. Statement of the Facts

Throughout the lengthy appellate proceedings in this case, the government has consistently mischaracterized the trial record.[1] It has remained true to that practice in its

[1] *See, e.g.*, Reply/Response Brief for Defendant-Appellant, filed September 19, 1991, at 9-13; Defendant's Corrected Response to the Brief for the United States in Support of Partial Rehearing En Banc, filed July 7, 1993, at 1.

Petition. We address the government's specific misstatements below. Particularly offensive, however, is the government's continued emphasis on the charges of conspiracy and obstruction of which Judge Aguilar was acquitted, *see* Pet. at 4, 6-7, the more so because they are entirely irrelevant to the issues that the government has presented for review. The government's disingenuous presentation of disproved allegations as "facts" suggests that the only "special and important reason[]" for review on certiorari, S. Ct. R. 10.1, is the government's wish to be relieved from the unanimous findings of two successive juries.

1. Events Related to the Section 2232(c) Charge

This case arises out of a prolonged, extensive and ultimately fruitless FBI probe of possible labor racketeering activities by the late Abie Chapman, then an 83-year old alcoholic and distant relative of Judge Aguilar and Rudy Tham, a former union official. 4 Tr. 669; 7 Tr. 965, 982. On April 20, 1987, the FBI obtained an authorization signed by Judge Robert Peckham of the United States District Court for the Northern District of California for a 30-day wiretap on phones used by Tham. Chapman, an associate of Tham, was named on the application as someone whose conversation might be intercepted. The wiretap expired without renewal on May 20, 1987, and on May 21, 1987 Judge Peckham signed an order terminating the wiretap. 7 Tr. 917-919, 929, 933-35; Pet. at 5a.[2]

[2] Many of the facts in this Statement of the Facts are drawn directly from the *en banc* panel's opinion, which adequately and accurately sets forth the relevant facts. *See* Pet. at 2a-7a, 16a.

On July 9, 1987, an FBI agent assigned to Chapman observed Judge Aguilar eating lunch with Chapman, who had a criminal record. 7 Tr. 964-69. Soon thereafter, on August 5, 1987, the Special Agent in charge of the FBI's San Francisco office visited Judge Peckham and told him that Judge Aguilar had been seen in Chapman's company. 7 Tr. 920, 938, 986, 1010.

Four days later, Judge Peckham met Judge Aguilar at a social function and told him that Abie Chapman's name had come up "in the course of" or "in connection with" a wiretap application. 7 Tr. 921, 942. Judge Aguilar responded that he "[knew] the old man." 7 Tr. 921, 942-43; *see also* 9 Tr. 1213-14. In fact, Chapman was married to Josephine Knaack, an old friend of the Aguilar family and the mother of Judge Aguilar's sister-in-law. 5 Tr. 821-22; 9 Tr. 1207-08. Judge Aguilar had no other knowledge of the application to intercept Tham's calls, which had by then already expired, and no further conversations with Judge Peckham on this subject. *See* Pet. at 69a, 88a.

Six months later, on February 6, 1988, Chapman invited himself to Judge Aguilar's home. After a few minutes and two drinks, Chapman got up to leave. As Judge Aguilar walked outside with Chapman, he noticed a man sitting in a car across the street, who was holding a camera and attempting to conceal himself from Judge Aguilar. When Chapman drove away, the man followed him. 5 Tr. 802-03, 815; 9 Tr. 1256-58, 1328-29; Pet. at 7a.

Judge Aguilar was understandably concerned by the sight of what appeared to him to be a law enforcement official watching and photographing him at home. *See*

Pet. at 7a. Judge Aguilar knew that Chapman was on his way to visit his stepdaughter, Marilyn Knaack Aguilar, but Judge Aguilar did not have her phone number. Instead, he called his nephew, Steve Aguilar (Marilyn Knaack Aguilar's son) and asked him to come over. 5 Tr. 821-23; 9 Tr. 1271, 1328; Pet. at 7a. When Steve arrived, Judge Aguilar told him that he had seen an FBI agent following Chapman and that he heard at work that telephones might be tapped. He asked Steve to go to his mother's house and personally tell Chapman that he did not want Chapman to call or visit him any more. Steve Aguilar relayed the message. 5 Tr. 824-26, 832; 9 Tr. 1272-73; Pet. at 7a. There was no evidence that Chapman's phone lines were ever tapped, and the only wiretap of which Judge Aguilar might have had knowledge had expired eight months before. Pet. at 7a.

2. Events Related to the Section 1503 Charge

In late 1987, Chapman and the late Edward Solomon, whom Judge Aguilar knew from law school, visited Judge Aguilar's house with a Section 2255 petition collaterally attacking Tham's conviction for embezzlement, which was then pending before Judge Weigel, Judge Aguilar's colleague. 4 Tr. 602-03, 606, 608, 611, 643; 9 Tr. 1206, 1215-17. Judge Aguilar looked at the motion, advised Solomon (who was representing Tham) to get the case on the calendar and stated that Judge Weigel would give Solomon a "fair shot" on the motion. 4 Tr. 611-13, 646, 651-54, 719-27; 9 Tr. 1215-20.

Although Judge Aguilar inquired of Judge Weigel concerning the status of the Section 2255 petition, Judge

Weigel testified unequivocally that Judge Aguilar made no attempt to influence his ruling on the petition. 9 Tr. 1224-28, 1236-37, 1249; Pet. at 4a. The jury agreed, acquitting Judge Aguilar of the charge that he conspired with Tham, Solomon and Chapman to influence Judge Weigel. Pet. at 4a.

Unlike the jury, the FBI did not believe Judge Weigel when he told them that Judge Aguilar had not acted improperly. Instead, the FBI pressed him to wear a tape recording device to a luncheon that he was to attend with Judge Aguilar in order to record any statement Judge Aguilar made to him. Judge Weigel was highly incensed at the FBI's request and he refused. 9 Tr. 1240-42. Contrary to the implication conveyed by the government's Statement, Pet. at 6, Judge Weigel recused himself from Tham's petition, which he had preliminarily decided to deny, not because of questionable conduct by Judge Aguilar, but because of the FBI's heavy-handed intervention. 9 Tr. 1236, 1245.

The FBI had more luck with Solomon. On May 10, 1988, the FBI approached Solomon, told him that his phones had been tapped, and accused him of obstruction of justice. 4 Tr. 617, 669-74. Although he did not believe that he was guilty of obstruction, Solomon agreed to cooperate because he feared the cost and risk of a trial and he was concerned about previous problems relating to his income tax. *See* 4 Tr. 674, 678-80. Solomon subsequently wore a recording device to two meetings with Judge Aguilar in an attempt to elicit information for the FBI. 4 Tr. 617, 684-85, 687-88; 8 Tr. 1102; *see* App. ER at 4-53. Based on these conversations, the government also charged that Judge Aguilar violated 18 U.S.C. § 1503 by

attempting to induce Solomon to testify falsely. The jury acquitted Judge Aguilar of this charge as well. Pet. at 29a; 15 Tr. 1591.

By virtue of the wiretaps, Solomon's cooperation, the recorded conversations between Judge Aguilar and Solomon, and the interview of Judge Weigel, the FBI was familiar with all the relevant facts concerning Judge Aguilar's relationship with Solomon and Chapman and whether Judge Aguilar had attempted to intervene with Judge Weigel. App. ER at 57. Nevertheless, on June 22, 1988, two FBI agents interviewed Judge Aguilar on these subjects for no apparent purpose other than to induce Judge Aguilar to make the false statements. "There [was] no evidence that a grand jury had authorized or directed the FBI investigation; nor [was] there evidence that the FBI agents had been subpoenaed to testify." Pet. at 18a. Likewise, there was no evidence that the agents ever testified before the grand jury either directly or through the hearsay testimony of others.

Judge Aguilar explained that he was asked by someone, probably Chapman, to find out when there would be a hearing on a motion, and that Judge Aguilar had done so. App. ER at 57-59, 69. In response to an agent's question, Judge Aguilar told them that he had known Solomon since 1955, App. ER at 61, and that he had found out recently that Solomon was Tham's attorney. App. ER at 62. Judge Aguilar said that he did not discuss the Tham matter with Solomon, App. ER at 62, 69, and that he did not find out or learn of any wiretap order on Chapman. App. ER at 70-71. The jury found that some of these statements were false.

The government's Statement implies incorrectly that the FBI agents made Judge Aguilar aware that a grand jury was meeting prior to eliciting the false statements. Pet. at 8. The plain fact that emerges from the transcript of the interview is that Judge Aguilar repeatedly sought to determine whether a grand jury was reviewing the issues that were the subject of the FBI interview and the agents rebuffed or evaded his questions. *See* App. ER at 54-80. Throughout the colloquy that included the statements found to be false, neither the agents nor Judge Aguilar mentioned a pending grand jury proceeding, although Judge Aguilar asked the agents whether he was a target of their investigation. *After* the false statements were made, Judge Aguilar asked again whether he was a "target." On this occasion, an agent answered with a confusing response about grand jury proceedings, but did not directly confirm that a grand jury was meeting or that Judge Aguilar was a subject of its inquiry. *See* App. ER at 73.

Judge Aguilar remained confused about whether a grand jury was in fact pending or merely was being considered. A few moments later, Judge Aguilar asked again whether "a Grand Jury's gonna meet." App. ER at 74. The agent made no effort to clear up the confusion, replying opaquely: "Okay." *Id.* Judge Aguilar later testified that "*[a]fter* the interview was over" it was his "*impression*" that his statements would be reported to the grand jury. 9 Tr. 1360 (emphasis added); *compare* Pet. at 14.

II. REASONS FOR DENYING THE PETITION

This case presents a particularly poor occasion for the Court to exercise its discretionary power of review. Although the government litters its Petition with references to "freshly minted exceptions" and "limitations," it cannot point to a single case supporting the application of 18 U.S.C. § 1503 in circumstances so far removed from any exercise of the grand jury's authority, nor can it identify *any* case decided under 18 U.S.C. § 2232(c), much less one endorsing an interpretation of the statute squarely at odds with its plain terms.

With respect to Section 1503, moreover, review of Judge Aguilar's conviction would be an empty exercise. The Petition fails to acknowledge that Judge Aguilar's conviction on the obstruction count was reversed by a panel of the Ninth Circuit on independent and unassailable grounds. Just as important, shortly after the conduct for which Judge Aguilar was charged under Section 1503, Congress, through amendment to 18 U.S.C. § 1512, explicitly undertook to resolve a conflict about the overlap between the omnibus clause of Section 1503, under which Judge Aguilar was charged, and Section 1512, which dealt specifically with interference with witnesses. By this amendment, Congress made clear that it intended to address questions such as the one presented here through specific provisions in Section 1512 *and not* through the omnibus clause of Section 1503. Review by this Court would be a matter of historical curiosity only: it would not even affect the outcome of this case, much less any other.

The Ninth Circuit's ruling on Section 2232(c) is an even less worthy object of the Court's certiorari power. The proceedings below are the first and only reported proceedings applying Section 2232(c). Without support from the language of the statute, the decisions of other courts, or even meaningful legislative history, the government asks this Court to reconsider an interpretation that conscientiously comports with the statute's express terms.

Together, the best that can be said about the issues presented by the government for review is that consideration of the scope of the omnibus clause of Section 1503 comes too late, while speculation about the outer limits of Section 2232(c) comes too soon. Neither issue merits review by this Court.

A. Section 1503

By its Petition, the government seeks the Court's endorsement of an application of Section 1503 that was nothing more than an adventure in artful pleading, unsupported by the terms of the statute, prior judicial decision, or even a compelling government interest. Although all parties agree that the interests implicated by Judge Aguilar's conduct are directly addressed, if at all, by 18 U.S.C. § 1001 (false statements to government agencies), the government eschewed the use of this statute because Section 1001 is not a predicate act of "racketeering activity" for the purposes of its RICO charge. *See* 18 U.S.C. § 1961(1). Although the RICO charge has long-since been abandoned and the underlying accusations

against Judge Aguilar resolved by acquittals, the government persists in its effort to apply Section 1503 to circumstances where it does not fit, was never before applied, and now may no longer be used.

1. Review of This Case Will Not Resolve the Issue Presented or the Outcome of the Prosecution

Before this Court can reach the narrow question of whether simple false statements to an investigator may be said to "obstruct or impede the due administration of justice," the Court would be required first to resolve the threshold question of whether Section 1503 addresses *any* conduct relating to potential witnesses, much less the particular type of conduct alleged here. Although that question was, at the time of the conduct giving rise to the charges against Judge Aguilar, the subject of a split among the Circuits, Congress later amended the statutory scheme and clearly expressed its intent that Section 1512, *not* Section 1503, govern such conduct. The issue presented here is thus purely historical as it relates to the application of Section 1503.

As this Court is well aware, the omnibus clause of Section 1503 does not stand as the last or only protection against obstructive conduct, but instead forms only a small part of a comprehensive statutory scheme designed to protect a broad array of interests.[3] In particular,

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[3] *See, e.g.*, 18 U.S.C. §§ 1501 (process servers); (judges, court officers, and jurors); 1505 (Executive Branch agencies and Congressional Committees); 1509 (court orders); 1510 (criminal investigations); 1511 (state or local law enforcement); 1512

Congress has spent the better part of a decade refining the terms under which violent, coercive, or misleading conduct toward witnesses or potential witnesses may be punished as obstruction of justice. As originally enacted, Section 1503 expressly included witnesses among those whom it protected. *See* Pet. at 19a & n.5 (quoting original text of Section 1503); 62 Stat. 769, 18 U.S.C. § 1503 (1948). In 1982, as part of the Victim and Witness Protection Act, Congress amended Section 1503 to its present form by eliminating *all* references to witnesses;[4] it simultaneously added Section 1512, which was specifically tailored to

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(witnesses, victims and informants); 1513 (same); 1514 (civil actions to restrain harassment of victims and witnesses).

[4] Section 1503 provides:

> Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or other committing magistrate, in the discharge of his duty, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, commissioner, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

18 U.S.C. § 1503.

address witness tampering. *Id*; Victim and Witness Protection Act, Pub. L. No. 97-291, 96 Stat. 1249 (1982). As first enacted, Section 1512 only proscribed the use of intimidation, physical force, threats or misleading conduct. 18 U.S.C. § 1512 (1985). The circuits interpreting the statutory scheme split over whether non-coercive witness tampering not expressly covered by Section 1512 could be prosecuted under the omnibus clause of Section 1503 after the enactment of 1512.[5] In 1985, over the dissent of three of its members, this Court expressly declined to resolve that disagreement. *Cooper v. United States*, 471 U.S. 1130, 1130-31 (1985) (White, J., Brennan, J., and Marshall, J., dissenting).

Three years later, Congress intervened finally to resolve the conflict. In 1988, several months after the conduct at issue here, the Criminal Law and Procedure Minor Substantive and Technical Amendments Act of 1987 was enacted, which amended Section 1512 to include generic non-coercive behavior towards witnesses – "corrupt[] persua[sion]" – within the class of proscribed behavior. *See* Criminal Law and Procedure Minor Substantive and Technical Amendments Act of 1987, Pub. L. No. 100-690 (1987); 18 U.S.C. § 1512(b). This is, of course, precisely the term of the omnibus clause of Section 1503 upon which the government relied to prosecute Judge

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[5] *Compare United States v. Hernandez*, 730 F.2d 895, 899 (2d Cir. 1984); *United States v. King*, 762 F.2d 232 (2d Cir. 1985), *cert. denied*, 475 U.S. 1018 (1986) *with United States v. Lester*, 749 F.2d 1288, 1295-96 (9th Cir. 1984); *United States v. Rovetuso*, 768 F.2d 809 (7th Cir. 1985), *cert. denied*, 474 U.S. 1076 (1986); *United States v. Wesley*, 748 F.2d 962 (5th Cir. 1984), *cert. denied*, 471 U.S. 1130 (1985).

Aguilar. As the House Report accompanying the act confirms, Congress intended to "resolve[] [the circuit] conflict by amending 18 U.S.C. 1512(b) to proscribe 'corrupt persuasion.' " H.R. Rep. No. 100-169, 100th Cong., 1st Sess. (1987) at 12. The report continues:

> It is intended that culpable conduct that is not coercive or "misleading conduct" be prosecuted under 18 U.S.C. 1512(b), rather than under the [omnibus] clause of 18 U.S.C. 1503. [The amendment], therefore, will permit prosecution of such conduct in the Second Circuit, where such prosecutions cannot now be brought, and will in other circuits result in prosecutions being brought under 18 U.S.C. 1512(b).

Id. This legislative history simply confirms what is obvious from the language of the amendments: Section 1512 and not Section 1503 now governs *all* forms of witness tampering.[6]

In sum, the best that can be said for the issue presented by the government is that it has no continuing relevance. Congress has clearly evidenced its intent to address all potentially obstructive conduct towards witnesses, including "corrupt persuasion," in the context of Section 1512, not Section 1503. The question presented by

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[6] Congress did not amend the omnibus clause of Section 1503 in 1987, nor need it have done so in order to achieve its stated objective. The omnibus clause continues to serve other important purposes unrelated to witnesses even after the enactment of Section 1512 and the 1987 amendments to it. It is difficult to imagine another way for Congress to have accomplished its purpose, short of eliminating the omnibus clause altogether, which would have curtailed Section 1503 in ways Congress obviously did not intend.

the government's Petition – whether "false and misleading statements to prospective witnesses" constitute obstruction of justice – must now of necessity be resolved according to, or at least with reference to the amended terms of Section 1512(b); and that question cannot conceivably be addressed through this prosecution.[7] The only question presented in this case is whether such conduct violated Section 1503 prior to the amendment of Section 1512. Having declined to address the interplay between Sections 1503 and 1512 in *Cooper*, when it could be said to have mattered, it hardly makes sense for the Court to revisit that issue now in order to decide the narrow question of whether the novel use of Section 1503 in this case was appropriate.

Although the government cites "the importance of this prosecution" as a basis for granting review, the conviction of Judge Aguilar under Section 1503 cannot be saved by review of the issue presented by the government. Before the Court of Appeals set this case for *en banc* review, the panel hearing the cross-appeals had already reversed Judge Aguilar's conviction under Section 1503 on independent grounds, holding that the jury instruction defining knowledge impermissibly shifted the burden of

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[7] It is possible, of course, that the government takes the position in this Court that, notwithstanding the irrefutable evidence of contrary legislative intent, Section 1503 *still* covers non-coercive witness tampering. While that argument would have the virtue of presenting a live question, it cannot be answered through Judge Aguilar's prosecution, which must be addressed according to the statutory landscape as it existed before the 1988 amendments to Section 1512(b).

proving an essential element of the offense to the defendant and erroneously lowered the government's burden of proof. Pet. at 77a-86a; 104a-105a. Relying both on the paucity of evidence that Judge Aguilar had any knowledge of the pendency of a grand jury proceeding or that the agents might appear before it as witnesses, as well as this Court's recent decision in *Sullivan v. Louisiana*, 113 S. Ct. 2078 (1993), the panel concluded that this error was not harmless as to the Section 1503 conviction. Pet. at 86a-90a; 104a-105a. Although the *en banc* court declined to reach this issue, the government can offer no plausible grounds to disturb that result and has not suggested that this issue also warrants this Court's review.

2. No Court Has Ever Construed Section 1503 to Cover Conduct that is Wholly Unconnected With Any Exercise of Grand Jury Authority

Although the government refers glibly to "freshly minted exceptions" to Section 1503, it cannot point to a single case in which simple false statements to *any* potential witness or false statements to law enforcements agents who were not acting on behalf of a grand jury have *ever* been punished under Section 1503.

Far from constituting a "freshly minted exception," the decision of the Ninth Circuit in this case is consistent with all prior decisions applying Section 1503, including every case identified by the government: every single court to construe Section 1503 has required a direct nexus between the conduct alleged to be criminal and the lawful exercise of the grand jury's authority. Thus, as the

government notes, the courts have routinely applied Section 1503 to false testimony to the grand jury, *United States v. Langella*, 776 F.2d 1078 (2d Cir. 1985), *cert. denied*, 475 U.S. 1019 (1986), its investigator, *United States v. Hawkins*, 765 F.2d 1482 (11th Cir. 1985), *cert. denied*, 474 U.S. 1103 (1986), as well as to efforts to defeat the grand jury's subpoena power by altering, destroying or concealing evidence, *United States v. McComb*, 744 F.2d 555 (7th Cir. 1984) (alteration of documents subpoenaed by grand jury); *United States v. Shoup*, 608 F.2d 950, 959-63 (3d Cir. 1979) (falsification of evidence by contractor hired to assist grand jury investigation); *United States v. Walasek*, 527 F.2d 676 (3d Cir. 1975) (destruction of documents subpoenaed by grand jury); Pet. at 14-15.

The courts thus have been vigilant in protecting the authority of the grand jury, whether it acts directly or through an intermediary; at the same time, however, they have consistently refused to conflate the independent functions of the FBI, on the one hand, and the grand jury, on the other. The courts have rebuffed efforts to shoehorn within Section 1503 conduct that does *not* implicate the exercise by the grand jury of its authority to compel the truthful testimony of witnesses or the production of documents. *See United States v. Brown*, 688 F.2d 596, 598 (9th Cir. 1982) ("the obstruction of a government agency's investigation is insufficient to trigger § 1503"); *United States v. Simmons*, 591 F.2d 206, 208 (3d Cir. 1979) (obstruction of an FBI investigation does not violate Section 1503); *United States v. Fayer*, 573 F.2d 741, 745 (2d Cir.) (same), *cert. denied*, 439 U.S. 831 (1978).

Both the decision of the Court of Appeals below as well as the decision of the Court of Appeals for the

Fourth Circuit in *United States v. Grubb*, 11 F.3d 426 (4th Cir. 1993), upon which the government relies to assert a conflict among the circuits, are consonant with this principle. In *Grubb*, the indictment alleged that "the Grand Jury was assisted in this investigation by Special Agents of the FBI . . . ", 11 F.3d at 436 n. 15, and the evidence showed that the grand jury investigation was "being conducted through this FBI agent." *Id.* at 436. By contrast, the Court of Appeals below found that "[t]here [was] no evidence that a grand jury had authorized or directed the FBI investigation; nor [was] there evidence that the FBI agents had been subpoenaed to testify." Pet at 18a. Rather, the government explicitly based its prosecution on the premise that the FBI agents were *not* acting for or on behalf of the grand jury. 10 Tr. 1632-33. Instead, the only nexus between the agents and the grand jury that the government identifies is that the agents were potential witnesses. Pet. at 15.

The unanimous decision of the Ninth Circuit *en banc* in this case thus does no violence at all to the principle consistently recognized by the Courts to determine when Section 1503 may be applied, nor is it inconsistent with the reasoning of the Fourth Circuit in *Grubb*.[8] By contrast, the rule advocated by the government would vastly expand the scope of Section 1503. In the absence of any proof that the FBI agents here were or were intended to

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[8] We are, frankly, at a loss to explain the mention in *Grubb* of a conflict with the Ninth Circuit, since it refers to the decision by the panel in this case that did not decide the question ultimately resolved by the Ninth Circuit *en banc*. *See Grubb*, 11 F.3d at 437 n.20.

be grand jury witnesses, the rule advocated by the government would treat any interference with the FBI's evidence-gathering function as an obstruction of the grand jury. It would for the first time sweep within Section 1503 all potentially false or misleading statements to law enforcement investigators, regardless of whether the investigations were moored in any fashion to the grand jury's exercise of its authority. Such an unprecedented expansion of the statute is wholly unwarranted by the consistent decisions of every court to consider Section 1503. It would, moreover, swallow whole Congress' efforts to refine questions relating to the obstruction of potential witnesses through Section 1512(b), notwithstanding Congress' clear efforts to avoid this result. It would accomplish these objects, finally, without protecting a single articulable government interest not already addressed directly through other statutes.

The use of Section 1503 in this case was unfortunate, unprecedented, unwarranted and ill-conceived. The unanimous decision of the *en banc* Court does not merit further review.

B. Section 2232(c)

In a case of first impression, although of no special importance, the government asks the Court to construe Section 2232(c) contrary to its plain terms based upon a supposed legislative purpose unexpressed in the statute or its legislative history. Section 2232(c) protects the secrecy of authorizations to intercept electronic communications while such authorizations are in effect or while

applications for authorization are pending. Once a wiretap authorization has expired, or an application for authorization has been denied, Section 2232(c) no longer prohibits its disclosure. While the government might assert a limited interest in protecting the secrecy of expired wiretaps, Congress expressly confined Section 2232(c) to pending or ongoing wiretap authorizations. The government does not supply a reasoned interpretation of the language, a single precedent, or legislative history that would dictate a contrary result. This Court's review is wholly unwarranted.

1. The Plain Language of Section 2232(c) is Inconsistent with the Interpretation the Government Proposes and the Interests it Seeks to Protect

18 U.S.C. § 2232(c) provides:

> Whoever, having knowledge that a Federal investigative or law enforcement officer has been authorized or has applied for authorization under chapter 119 to intercept a wire, oral, or electronic communication, *in order to obstruct, impede or prevent* ***such interception***, gives notice or attempts to give notice of ***the possible interception*** to any person shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C. § 2232(c) (1988) (emphasis supplied). In the only reported opinion to construe this provision, the *en banc* court confirmed what is clear from the plain language of the statute: "the purpose of the statute is to prevent interference with 'possible interception.' " Pet. at 9a. Once a wiretap has expired or been denied, the Ninth

Circuit reasoned, there is no "possible interception" to disclose or to attempt to disclose. *Id.* The "plain language" of Section 2232(c) does not prohibit the conduct alleged in this case. *Id.* That narrow purpose is further evidenced by the statute's intent requirement, which limits punishable disclosures to those undertaken with intent to interfere with "such interception" of which the defendant has knowledge. *See id.* Under the circumstances, the disclosure of an expired wiretap not only fails to violate the terms of the statute, it also fails to implicate any interest protected by Section 2232(c).

The Petition is completely devoid of a reasoned, alternative explanation accounting for all the terms of the statute. The government simply reads the phrase "possible interception" out of the statute. It baldly asserts that "there is no basis in the statutory language for the court of appeals requirement that [] obstruction be *possible* at the time the disclosure was made." Pet. at 23 (emphasis supplied). Even in its own flawed argumentation, the government cannot avoid using the very language of the statute to express the requirement it inexplicably claims to be unable to locate. The government likewise simply ignores the limited intent requirement, or as it did below, asserts incorrectly that the statute punishes disclosures designed to interfere with government investigations. *See* Brief For the United States of America (Aug. 9, 1991) at 38-39. The government's reading of Section 2232(c) violates "the settled rule that a statute must, if possible, be construed in such fashion that every word has some operative effect." *United States v. Nordic Village, Inc.*, 112 S. Ct. 1011, 1015 (1992). As the Ninth Circuit concluded,

the interpretation of Section 2232(c) that the government urges on this Court is not even "reasonable." Pet. at 8a.

2. The Government Provides No Meaningful Authority that Would Contradict the Plain Meaning of Section 2232(c)

The government provides literally no precedent, even by analogy, that might suggest that Section 2232(c) has a broader meaning or purpose than its terms reflect. *See* Pet. at 20-25. Essentially, the government relies on a *single* piece of evidence to make its case: "an isolated phrase in a Senate Committee Report." Pet. at 10a; *see* Pet at 23-24. Given the unambiguous terms of Section 2232(c), resort to legislative history is inappropriate. *See Sullivan v. Stroop*, 496 U.S. 478, 482 (1990); *United States v. Turkette*, 452 U.S. 576, 580 (1981). As the *en banc* court noted, "[i]t is only if the language is unclear that [a court] refer[s] to legislative history as an aid to statutory interpretation." Pet. at 10a (citing *Blum v. Stenson*, 465 U.S. 886, 896 (1984)).

Even if resort to legislative history were appropriate, the Senate Report does little to advance the government's cause. In summarizing Section 2232(c), the Senate Report on which the government relies notes that "[t]he defendant must engage in conduct of giving notice of the possible interception to any person who *was* or is the target of the interception." *See* S. Rep. No. 541, 99th Cong., 1st Sess. 1, 34 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3555, 3588; Pet. at 23 (emphasis supplied). From the use of the single word "was," the government contends that Section 2232(c) was intended to reach expired wiretaps. *See* Pet. at 23-24.

The most that can be said for the sentence on which the government relies, however, is that it represents a sloppy effort to capture the terms of Section 2232(c). It describes a statute broader in some respects and narrower in others than the provision Congress actually enacted. By its plain terms, the statute does not reach disclosures to someone who "was" a target of the interception, since it encompasses only "possible interception[s]." At the same time, the statute is plainly not limited, as the report suggests, only to disclosures to the "target of the interception." Rather, as all parties agree, the statute reaches disclosures made to *anyone* with the intent to impede the known interception.[9]

3. The First Amendment and the Rule of Lenity Preclude the Government's Interpretation

The government's interpretation of Section 2232(c) also runs afoul of the First Amendment and the Rule of Lenity. This Court has made clear time and again that where the interests of the First Amendment and the government collide, the government bears the burden of

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[9] The government's reliance on the fact that Section 2232(c) punishes attempted disclosures, *see* Pet. at 24, is a red herring. Contrary to the government's assertion, the Ninth Circuit did *not* find that "the statute requires proof that the defendant be shown to have succeeded in obstructing the interception of a wire communication." *Id.* at 23; *compare id.* at 12a-13a. There is no dispute that Section 2232(c) punishes the "attempts to give notice of [a] possible interception." 18 U.S.C. § 2232(c). "The issue in this case is not whether Judge Aguilar attempted to disclose prohibited wiretap information, but whether the wiretap information he did disclose was prohibited." Pet. at 13a.

demonstrating a compelling "state interest of the highest order" before it may punish the disclosure of information. *Smith v. Daily Mail Pub. Co.*, 443 U.S. 97, 103 (1979). It may be that under certain circumstances, the government can assert a compelling interest in preventing the disclosure of the existence of a wiretap authorization or application.[10]

However, the issue here is not whether the government *ever* could identify such an interest, but whether it can identify such an interest, consistent with the statute, for a wiretap that has long-since expired.[11] Before the Ninth Circuit, the government argued that it had a compelling interest in protecting law enforcement interests

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[10] That question is not free from doubt. The Court has specifically reserved the question of whether the First Amendment permits the criminal punishment of "one who secures . . . information by illegal means and thereafter divulges it." *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 837 (1978).

[11] The interest that the government identifies also must be consistent with the facts of this case. As the government has acknowledged, *see* Pet. at 43a, 87a, 91a, at least a substantial portion of Judge Aguilar's suspicions about electronic surveillance arose from the fact the government chose to conduct a public surveillance of Chapman from a car parked in front of Judge Aguilar's house. It would be "highly anomalous" to punish Judge Aguilar for commenting upon activities the government chose to conduct in public. *See The Florida Star v. B.J.F.*, 491 U.S. 524, 535 (1989). The First Amendment requires the government to demonstrate that it has eliminated the risk of wrongful disclosure "through careful internal procedures" before it may impose criminal penalties on outsiders. *Landmark Communications, Inc.*, 435 U.S. at 845. This Court has yet to identify a circumstance in which the government has met its burden.

generally or in future efforts at electronic surveillance. *See* Brief for the United States of America (Aug. 9, 1991) at 38-39; *see also* Pet. at 39a. Recognizing that Section 2232(c) does not even purport to protect these interests – since by its terms it protects only attempts to interfere with the particular interception that has been disclosed – the government has retreated from that argument here. Instead, it now argues that it has a compelling interest in the protection of the secrecy of extensions and re-authorizations of wiretaps. Pet. at 22. That interest, however, is not even arguably implicated by the government's efforts to apply Section 2232(c) to the facts of this case. The wiretap application of which Judge Aguilar allegedly was aware resulted in an interception that terminated 30 days after it was begun, Pet. at 5a; it was never extended or re-authorized, *id.*, and had been completely defunct for nearly eight months when the alleged disclosure was made. *Id.*

There may come a time when this Court is presented with the question of whether disclosure of an application or authorization for a wiretap violates Section 2232(c) when the wiretap has been extended or re-authorized. At that time, this Court also will be called upon to decide whether such an interpretation conflicts with the First Amendment. But this is, indisputably, not such a case. Despite its repeated efforts, the government cannot identify an interest within the reach of Section 2232(c) that would warrant punishing the disclosure of expired wiretaps. Its utter failure fully supports the Ninth Circuit's refusal to embrace a Constitutional confrontation by

broadly construing Section 2232(c). *See Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988).[12]

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[12] As the Ninth Circuit noted in conclusion, even if the government's interpretation of Section 2232(c) were possible because of some ambiguity, "the more lenient construction is required." Pet. at 24a-25a. This Court has long emphasized that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *United States v. Bass*, 404 U.S. 336, 347 (1971) (quoting *Rewis v. United States*, 401 U.S. 808, 812 (1971)). Thus, if any "reasonable doubt persists about a statute's intended scope even *after* resort to 'the language and structure, legislative history and motivating policies' of the statute," *Moskal v. United States*, 498 U.S. 103, 108 (1990), it should be construed narrowly. *See also United States v. Granderson*, 114 S. Ct. 1259, 1267 (1994).

III. CONCLUSION

For the foregoing reason, Respondent respectfully asks that the Petition for Certiorari be denied.

Respectfully submitted.

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